

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Applications of Comcast Corporation,)	MB Docket No. 14-57
Time Warner Cable Inc., Charter)	
Communications, Inc., and SpinCo to)	
Assign and Transfer Control of FCC)	
Licenses and Other Authorizations)	
)	

PETITION TO DENY OF ITTA

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ITTA – The Voice of Mid-Size Communications Companies hereby respectfully submits its petition to deny the applications of Comcast Corporation (“Comcast”), Time Warner Cable Inc. (“TWC”), Charter Communications, Inc. (“Charter”), and SpinCo to assign and transfer control of licenses and other authorizations¹ in accordance with the Federal Communications Commission’s (“FCC” or “Commission”) July 10, 2014 Public Notice seeking comment on the proposed transaction.²

¹ *In the Matter of Applications of Comcast Corporation and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations*, Applications and Public Interest Statement, MB Docket No. 14-57 (filed Apr. 8, 2014); Public Interest Statement of SpinCo, Charter Communications, Inc., and Comcast Corporation, Spin Transaction, MB Docket No. 14-57 (filed June 4, 2014); Public Interest Statement of Charter Communications, Inc. and Comcast Corporation, Comcast-to-Charter Exchange and Sale Transactions, MB Docket No. 14-57 (filed June 4, 2014); Public Interest Statement of Comcast Corporation and Charter Communications, Inc., Charter-to-Comcast Exchange and Sale Transactions, MB Docket No. 14-57 (filed June 4, 2014).

² *In the Matter of Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and SpinCo to Assign and Transfer Control of FCC Licenses and Other Authorizations*, Public Notice, MB Docket No. 14-57, DA 14-986 (rel. July 10, 2014) (“Public Notice”).

I. INTRODUCTION AND SUMMARY

ITTA's members are mid-size, incumbent local exchange carriers that provide a variety of communications services to subscribers in predominantly rural areas in 45 states. In addition to voice and high-speed data offerings, all ITTA members provide video service to subscribers utilizing a variety of distribution platforms, including IPTV networks, coaxial cable systems, and fiber infrastructure.³ Collectively, ITTA members pass nearly four million homes with video service and serve well over half a million video subscribers in approximately 50 television markets across the United States.

In nearly all of these markets, ITTA members are new entrant multichannel video programming distributors ("MVPDs") that compete head-to-head against both DBS providers, at least one (and in some cases two or three) incumbent cable operators, and online video providers, such as Netflix, Hulu, Amazon Video, Apple TV, and others. Comcast and TWC are the primary incumbent cable competitors throughout ITTA members' combined video footprint.

Although interested parties have raised a wide range of competitive issues posed by the proposed transaction,⁴ ITTA focuses in its petition on the anticompetitive effects of the proposed

³ At least two ITTA members also resell DBS service in a number of markets throughout their footprints. However, the data and information provided in this filing relates strictly to ITTA members' terrestrial-based video offerings.

⁴ *See, e.g.*, Diana L. Moss, "Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should Be Blocked," American Antitrust Institute (June 11, 2014) (focusing on two major categories of competitive issues stemming from Comcast's enlarged video distribution footprint and control over additional marquee programming content as a result of the merger: (1) Comcast/TWC would become a more powerful buyer of products and services provided by Internet backbone providers, content delivery networks, and peering intermediaries that interconnect upstream content with downstream ISP networks; and (2) Comcast/TWC would have an enhanced ability and incentive to engage in exclusionary conduct with respect to what rival content reaches its subscribers and what affiliated content reaches competitors' subscribers); Mark Cooper, "Buyer and Bottleneck Market Power Make the Comcast-Time Warner Merger 'Unapprovable,'" Consumer Federation of America (Apr. 8, 2014) (explaining

merger on the facilities-based video distribution market. The proposed \$69.8 billion combination would create a mammoth entity with unprecedented market power that would stymie facilities-based video competition throughout the country, harming consumers and the public interest.

The merger would significantly expand Comcast's content holdings, further enhancing existing vertical integration and Comcast's incentive and ability to withhold or drive up the cost of content for competitors. Comcast owns multiple national cable networks including Bravo, CNBC, E!, Golf Channel, MSNBC, NBC Sports Network, Oxygen, SyFy, and USA Network. It owns or partially owns eleven regional sports networks ("RSNs") in major television markets such as Philadelphia, the San Francisco Bay area, New England, and the Pacific Northwest. It owns two broadcast networks, NBC and Telemundo, and 26 broadcast stations. It also owns Universal Pictures, a movie studio that provides, acquires, markets, and distributes filmed entertainment worldwide.

(footnote cont'd.)

that the merger would allow Comcast to abuse its market power as a buyer of content and a seller of broadband access service that online video distributors need to compete to weaken competition and strengthen its dominant position); Letter from Ed Black, Computer & Communications Industry Association, to the Honorable Al Franken, U.S. Senate (filed June 9, 2014) (noting that the merged entity would have the ability to, among other things, use its bottleneck market power of last-mile Internet access to degrade the quality of service or raise the operating costs of online competitors to protect legacy cable revenue and restrict competition and innovation in peripheral markets); Gene Kimmelman, *Testimony Before the Senate Judiciary Committee Regarding the Impact of the Proposed Comcast/Time Warner Cable Merger*, Apr. 9, 2014, available at: <http://www.judiciary.senate.gov/imo/media/doc/04-09-14KimmelmanTestimony.pdf> (last visited Aug. 19, 2014) (observing that Comcast's control of more than half of high-speed Internet subscribers as a result of the merger would stifle Internet competition by giving the merged entity the power to degrade the quality of service or artificially raise costs for new online competitors); Letter from Jeffrey H. Blum, DISH Network Corporation, to Marlene H. Dortch, FCC, MB Docket No. 14-57 (filed Aug. 1, 2014) (pointing out the combined company's increased incentive and ability to leverage its control over the broadband pipe to undermine competing online video offerings).

TWC is itself a vertically-integrated cable company. It controls multiple RSNs in major markets in California (including the recently-launched SportsNet LA), Hawaii, Kansas, Missouri, Nebraska, New York, Ohio, Texas, and Wisconsin. It manages 26 local news channels, 16 local sports channels, and 10 “lifestyle” channels. If Comcast is allowed to buy TWC, it would acquire national programming services such as iN Demand and MLB Network, as well. The addition of these new programming assets to Comcast’s already robust portfolio of video programming will only increase Comcast’s incentive to withhold or drive up the price of such programming for other MVPDs.

The merger also would expand Comcast’s video distribution footprint to reach approximately 30 million video subscribers in 23 of the 30 largest MSAs, including New York and Los Angeles, the two largest markets in the country. As a result of the merger, Comcast would control almost a third of the multichannel video programming distributor (“MVPD”) market and almost 60 percent of all cable subscribers. This increased scale and scope would create enormous leverage for the merged entity as a buyer of programming and ensure that smaller providers get less favorable terms and conditions when purchasing programming.

ITTA members and other new entrant video providers have in recent years become a growing presence in the video distribution market because consumers have increasingly come to value the ability to subscribe to a suite of services that includes video programming bundled with data, voice, and other services. Offering a video product with numerous and diverse broadcast and non-broadcast programming options that consumers desire, including content affiliated with

other MVPDs, allows ITTA members to compete more effectively in today's communications marketplace.⁵

The Commission is well aware of the public interest benefits of competition from smaller, new entrant MVPDs, and has "repeatedly found... that entry by LECs and other providers of wire-based video service into various segments of the multichannel video marketplace will produce major benefits for consumers," including "lower prices, more channels, and a greater diversity of information and entertainment from more sources."⁶ Should the Commission allow the proposed merger to move forward, it would pose a significant threat to the market for facilities-based video distribution and continued entry and expansion by new providers like ITTA member companies. As explained below, approval of the proposed merger will represent a fundamental shift in the communications marketplace to the detriment of consumers and competition. The imposition of conditions, either behavioral or structural, would be insufficient to cure these defects. Therefore, the proposed merger should not be approved.

II. THE PROPOSED MERGER WOULD FUNDAMENTALLY ALTER THE MARKETPLACE TO THE DETRIMENT OF BOTH CONSUMERS AND COMPETITION

As the Commission moves forward with its review of the proposed transaction, it must remain cognizant of the broader marketplace implications associated with approving the deal and

⁵ ITTA members' provision of video service also drives broadband adoption when it is offered as part of a bundle with other communications services. In markets where ITTA members offer video as part of a bundle with broadband services, most have experienced steady and continued growth of both DSL and cable modem subscriptions. According to one ITTA member, 90% of its video subscribers also purchase high-speed Internet service.

⁶ *Exclusive Service Contracts for Providing of Video Service in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, ¶ 17 (2007).

how such action would fundamentally transform the communications industry, particularly the marketplace for delivery of video and Internet services.

Already, the announcement of the merger has triggered further industry consolidation with AT&T announcing plans to acquire DirecTV in a \$48.5 billion transaction.⁷ It is no secret that the proposed AT&T/DirecTV merger is a direct response to the Comcast/TWC/Charter merger.⁸ By combining AT&T's wireless business with DirecTV's pay-TV business, AT&T would be able to provide television content directly to its roughly 116 million mobile subscribers. In addition, when AT&T pools its 5.7 million U-verse customers with DirecTV's roughly 20.3 million U.S. subscribers, it would become the second largest MVPD in the country, allowing it to negotiate for better programming at a better price.⁹ In short, the deal would put the merged entity on more equal footing with Comcast/TWC.

Given how the marketplace continues to evolve, the Commission cannot view the Comcast/TWC/Charter transaction within a vacuum. Increasingly, there are fewer and larger companies in the communications space as the industry moves toward a single, national marketplace for fixed and mobile video, Internet, and voice services.¹⁰ Based on these developments, regulators must proceed slowly or consider a temporary moratorium on mega

⁷ Christopher Zara, "Why Is AT&T Buying DirecTV? With a Bigger Comcast Looming, Mobile and TV Industries are Converging," *International Business Times*, May 19, 2014, available at: <http://www.ibtimes.com/why-att-buying-directv-bigger-comcast-looming-mobile-tv-industries-are-converging-1586389> (last visited: Aug. 18, 2014).

⁸ *See id.*

⁹ Ben Popper "Here's Why AT&T Is Trying to Buy DirecTV," *The Verge*, May 19, 2014, available at: <http://www.theverge.com/2014/5/19/5730534/why-is-att-trying-to-buy-directv> (last visited: Aug. 18, 2014).

¹⁰ *See id.*

deals like the Comcast/TWC/Charter merger and other combinations that will inevitably emerge in its wake.¹¹

Rather than viewing these transactions as if each were an isolated event, the Commission must consider the industry-wide impact of such deals. Mega deals such as Comcast/TWC/Charter are part of a broader trend toward consolidation whose claimed benefits in terms of cost efficiencies, consumer benefits, and enhanced investment and innovation must increasingly be viewed with skepticism.¹² Rather than creating public interest benefits, such mergers “facilitate market structures that are conducive to tacit coordination that drives up price, restricts output, eliminates choice, and stifles innovation.”¹³ One way in which cable and broadband companies are able to engage in such behavior is by entering into transactions to swap service territories with would-be competitors to solidify their regional dominance. Such geographic clustering “make[s] markets less permeable to entry by innovative firms and smaller rivals, eliminate[s] potential competition, and increase[s] the risk of strategic exclusionary conduct by dominant players.”¹⁴ The proposed system swaps with Charter that are contemplated by the instant transaction would continue this anti-competitive and anti-consumer trend.

¹¹ Moss, *supra* n. 4, at 2. Following the failed merger between Sprint and T-Mobile earlier this month, it is now rumored that Dish may consider a bid on T-Mobile to expand its business beyond a standalone pay-TV model. Bob Ciura, “The Real Reason Dish Should Acquire T-Mobile,” *The Motley Fool*, Aug. 18, 2014, available at: <http://www.fool.com/investing/general/2014/08/18/the-real-reason-dish-network-should-acquire-t-mobi.aspx> (last visited Aug. 19, 2014).

¹² See, e.g., Scott A. Christofferson, Robert S. McNish, and Diane L. Sias, “Where Mergers Go Wrong,” *McKinsey on Finance 2004*, at 2-3, available at: <http://www.ceoexpress.com/asp/mckinseyalls4.asp?id=m0286> (last visited: Aug. 19, 2014).

¹³ Moss, *supra* n. 4, at 5.

¹⁴ *Id.*

The Commission must view this and other aspects of the proposed transaction through the proper lens in terms of its implications for the communications marketplace as a whole and should not be swayed by the purported consumer benefits touted by the parties that, in reality, are unlikely to materialize. Doing so could only lead to the conclusion that approving the merger would be inconsistent with competition policy and the public interest.

III. THE PROPOSED MERGER WOULD FURTHER INCREASE COMCAST'S UNFAIR COMPETITIVE ADVANTAGES WITH RESPECT TO PROGRAMMING

A. The Transaction Would Increase Comcast's Incentive and Ability to Harm Competition by Withholding or Driving Up the Cost of Affiliated Programming

In considering the Comcast/NBCU merger, the Commission recognized “the possibility that Comcast-NBCU, whether temporarily or permanently, will block Comcast’s video distribution rivals from access to the video programming content the [joint venture] would come to control or raise programming costs to its video distribution rivals.”¹⁵ The Commission understood that Comcast would seek to obtain or maintain market power by withholding its affiliated programming or raising prices for MVPD rivals. To guard against Comcast’s “anticompetitive exclusionary program access strategy,” the Commission adopted a set of merger conditions that included arbitration and standstill remedies.¹⁶ Rather than limiting application of the program access conditions to RSN networks, which the Commission has recognized “have no good substitutes, are important for competition, and are non-replicable,”¹⁷ the Commission

¹⁵ See *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶ 29 (2011) (“*Comcast/NBCU Order*”).

¹⁶ *Id.* at ¶ 44.

¹⁷ *In the Matter of Revision of the Commission’s Program Access Rules; News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of*

expanded the conditions to *all* Comcast/NBCU content. For the first time, the Commission recognized that certain national cable programming networks constituted “marquee programming” for which subscribers would switch to a different MVPD if that programming became unavailable or too expensive.

If this merger is approved, Comcast would control substantially more programming than it did after the Comcast/NBCU transaction, and would have even greater incentives to use that control to raise costs for, or deny access to, affiliated marquee and RSN content. This exclusionary conduct would manifest itself in any number of ways. Comcast could use its increased leverage to withhold programming from competing MVPDs during negotiation impasses either temporarily or permanently. Comcast could force rivals to pay for less popular programming by tying such programming to the purchase of marquee channels. Comcast could use uniform price increases to gain a competitive advantage over its smaller rivals by charging all distributors, including itself, a higher rate for affiliated programming than it would otherwise charge. While Comcast could treat the higher price as an internal transfer it can disregard when setting its own retail prices, competing MVPDs would be forced to pay more for the programming and increase retail rates for subscribers to recoup the increased costs, or forgo purchasing the programming altogether (and risk losing subscribers). What is certain is that Comcast will undoubtedly employ any or all of these tactics when it serves its interest to do so.

Unfortunately, increased retail competition from ITTA member companies and other providers in the MVPD marketplace is not enough to combat such conduct. To the contrary, the

(footnote cont’d.)

Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al., MB Docket Nos. 12-68, 07-18, 05-192, Notice of Proposed Rulemaking, FCC 12-30, ¶ 28 (rel. Mar. 20, 2012) (internal citations omitted).

rise in the number of MVPD competitors gives vertically-integrated video distributors additional motivation to discriminate against competitors with respect to affiliated programming. As the Commission has found, the growing presence of DBS and telco-based competition makes it even more enticing for vertically-integrated cable operators to withhold critical access to unique and desired programming that they alone can offer and that other MVPDs need to compete effectively.¹⁸ Thus, despite positive changes in the video marketplace in the form of increased retail competition among MVPDs, Comcast and other vertically-integrated cable companies continue to have the incentive and ability to discriminate against competing MVPDs with respect to content access.

Unlike established cable operators, new entrant MVPDs like ITTA member companies are not in a position to take advantage of the competitive benefits of programming exclusivity by launching their own new programming networks. This is unlikely to change in the foreseeable future given that recent Commission policy dictates that telco investment be focused on deployment of broadband network infrastructure rather than innovation through the creation of new services to be provided over such networks. Simply put, there is no realistic means for new entrants and smaller video providers to replicate the unique and valuable attributes of cable-affiliated sports and popular national network programming. Foreclosing or limiting access to such networks therefore will remain attractive to Comcast for purposes of undermining smaller and new entrant MVPDs' ability to compete in the video distribution marketplace.

¹⁸ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd 17791, ¶ 60-61 (2007), *aff'd sub nom. Cablevision Sys. Corp., et al. v. FCC* 597 F.3d 1306 (D.C. Cir. 2010).

B. The Merger Would Enable Comcast to Use its Increased Scale to Ensure that Potential Rivals Get Less Favorable Terms and Conditions for Programming

In addition to the vertical integration issues raised by Comcast's acquisition of additional programming content from TWC, Comcast's increased geographic footprint as a result of the merger would give Comcast further advantages over its rivals in the purchase of unaffiliated programming. It is well settled that programmers charge larger MVPDs less for programming on a per-subscriber basis than smaller MVPDs through volume discounts, which are based on the number of subscribers the MVPD serves. One study indicates that "small and medium-sized MVPDs pay per-subscriber fees for national cable network programming that are approximately 30% higher than the fees paid by the major MSOs."¹⁹ In the experience of ITTA member companies, fees paid for RSN programming in particular are as much as 50% higher for smaller MVPDs than for larger providers. However, program production and acquisition costs are sunk, and the transmission and administrative costs associated with delivery of programming are the same for all MVPDs, regardless of size. Thus, volume discounts or other pricing methods that favor larger or vertically-integrated providers are not reflective of marketplace considerations or the cost of doing business, placing smaller providers at an unreasonable competitive disadvantage vis-à-vis their larger rivals.

As a result of its increased size and scope, Comcast's network will become a must-have distribution platform for any and all programming content. Comcast's expanded footprint will give the merged entity unprecedented negotiating power with content providers, allowing it to secure even lower per-subscriber rates than those charged to other MVPDs, and in particular, smaller competitors like ITTA member companies. According to SNL Kagan, Comcast already

¹⁹ See Comments of the American Cable Association, MB Docket No. 07-269 (June 8, 2011), at 9.

has lower programming costs than other large cable operators, so the merger would only serve to enable Comcast to drive down these costs even further.²⁰ Even Comcast has admitted that “[o]ur scale, our programming discounts – you add it all together, a little bit here, a little bit there, it makes a big difference.”²¹ Any mention of the beneficial impact Comcast’s increased scale will have on its programming costs is notably absent from Comcast’s Public Interest Statement, presumably to avoid the perception that approval of the merger would give Comcast an undue competitive advantage over other providers.

The Commission cannot ignore the fact that the merger will exacerbate the already significant competitive disparities between Comcast and competing MVPDs, particularly smaller providers like ITTA member companies. The cost savings Comcast will enjoy with its dominant purchasing power will have to be made up elsewhere. Competing MVPDs will be forced to bear the cost, which will dramatically reduce the ability of smaller rivals, and especially new entrants, to provide meaningful competition. The result will be decreased competition in the video programming industry, and higher prices and fewer choices for consumers.

²⁰ Robin Flynn, “U.S. Multichannel Subscriber Update and Programming Cost Analysis,” SNL Kagan (June 2013), *available at*: <http://go.snl.com/rs/snlfinanciallc/images/SNL-Kagan-US-Multichannel-Subscriber-Update-Programming-Cost-Analysis.pdf> (last visited: Aug. 19, 2014).

²¹ “Q3 2006 Comcast Corporation Earnings Conference Call – Final,” Fair Disclosure Wire, Transcript 102606az.723 (Oct. 26, 2006) (Statement by Comcast Corp. CEO Bryan Roberts).

IV. THE BEHAVIORAL CONDITIONS PROPOSED ARE NOT SUFFICIENT TO REMEDY THE HARMS CAUSED BY THE MERGER

A. Behavioral Remedies Are Not Adequate to Address Harms to Consumers and Competition

The parties propose that the behavioral conditions the Commission imposed in approving the Comcast/NBCU merger be extended to Comcast/TWC.²² As a general matter, however, behavioral remedies are typically inadequate to address a merger's competitive harms because they are difficult to enforce and do not address the merged entity's profit-seeking motives that inevitably lead to behavior designed to circumvent the requirement or prohibition at issue. As other parties have observed, "the type of conduct prohibited by behavioral remedies often goes 'underground,' or the merged firm develops workarounds to exploit loopholes in the remedies."²³ In addition, "behavioral remedies require ongoing oversight, monitoring, and compliance enforcement" by both government regulators and the merged entity.²⁴ These inherent deficiencies make behavioral conditions insufficient to address the harms to consumers and competition that are posed by the instant transaction.

²² Both the Department of Justice ("DOJ") and the FCC imposed a variety of behavioral remedies on Comcast-NBCU to prevent exclusionary conduct or discrimination against rivals. For instance, in addition to the conditions set forth in the DOJ consent decree, the FCC adopted several behavioral remedies, including: (1) a prohibition on discrimination in programming carriage on the basis of affiliation; (2) a must carry requirement for news and business channels in the same "neighborhood;" (3) a requirement to add ten new independently owned and operated channels to its basic cable package; (4) a requirement to market standalone broadband service at a given speed and price for a fixed period of time; (5) a prohibition on offering a specialized service composed substantially or entirely of its own content; and (6) a prohibition on engaging in unfair methods of competition or unfair or deceptive actions to the detriment of traditional and online competitors.

²³ Moss, *supra* n. 4, at 18.

²⁴ *Id.*

Comcast's own conduct before and after the Comcast/NBCU merger suggests that behavioral conditions will do nothing to diminish the merged entity's incentive and ability to operate in an anticompetitive manner. Prior to the Comcast/NBCU merger, Comcast had a demonstrated history of withholding programming from its rivals, for example, its outright refusal to provide RSN content in Philadelphia to DirecTV and Dish.²⁵ Comcast's decision to withhold the Philadelphia RSN from competing MVPDs was not due to a dispute about prices or terms, but rather was Comcast's long-standing business policy.²⁶ As a result of Comcast's established practice of refusing to provide affiliated programming to its rivals, it was clear to the Commission that it "cannot rely on Comcast's assurances that it will not use its control of NBCU content anticompetitively."²⁷

Following the Comcast/NBCU merger, Comcast's pattern of anticompetitive behavior remains unchanged. Comcast has been involved in a number of disputes involving violations of the behavioral conditions adopted in the *Comcast/NBCU Order*. For example, Bloomberg filed a complaint at the FCC in June 2011 alleging that Comcast violated the news neighborhooding condition, which requires Comcast to provide unaffiliated news and business programming in the same "neighborhood" on its channel line-up as its affiliated news and business programming.

²⁵ *Comcast/NBCU Order* at ¶ 67.

²⁶ *Id.* at ¶ 71.

²⁷ *Id.* Comcast's anti-competitive practices can be seen in numerous other contexts. For example, Comcast has continually flouted state statutes and regulations in Vermont by refusing to pay the pole attachment rates the law requires, putting competing providers that are subject to the same legal obligations at a competitive disadvantage. See *Joint Petition of Charter Communications, Inc. and Comcast Corporation for Consent to Transfer 100% of the Equity in Helicon Group, LP, the holder of a Certificate of Public Good to Own and Operate a Cable Television System in Vermont, from Charter Communications, Inc. to Comcast Corporation, Petition to Intervene of Telephone Operating Company of Vermont LLC d/b/a FairPoint Communications, Vermont Public Service Board Docket No. 8309* (filed Aug. 14, 2014).

The FCC ruled in favor of Bloomberg in that dispute.²⁸ Similarly, online video distributor (“OVD”) Project Concord filed a complaint at the FCC in October 2011 alleging that Comcast violated a condition of the DOJ consent decree requiring Comcast to license content to OVDs on non-discriminatory terms.²⁹ The FCC agreed with Project Concord that the programming was subject to mandatory licensing, but found that licensing this content to Concord would put Comcast in breach of contractual obligations to third parties.³⁰ More recently, Netflix claimed that Comcast was slowing delivery of its service to Comcast subscribers, forcing Netflix to pay for direct connection to Comcast’s network “to reverse an unacceptable decline in our members’ video experience.”³¹ The Commission cannot continue to operate under the misconception that behavioral conditions will be enough to remedy anticompetitive and anti-consumer outcomes associated with the proposed merger in light of Comcast’s repeated misconduct.

B. The Comcast/NBCU Conditions Are Not Adequate to Address Various Aspects of a More Complex Merger

Even assuming, *arguendo*, that behavioral conditions can be sufficient to address public interest concerns with a proposed merger, the Comcast/NBCU conditions would have only very limited value if applied to the transaction at issue here. The Comcast/TWC/Charter transaction is much larger and more complex than the Comcast/NBCU merger and entails significant competitive issues that the Comcast/NBCU conditions simply do not address. Unlike the

²⁸ *In the Matter of Bloomberg L.P. v. Comcast Cable Communications*, MB Docket No. 11-104, Memorandum Opinion and Order, FCC 13-124 (rel. Sept. 26, 2013).

²⁹ See Proposed Final Judgment, *United States v. Comcast Corp.*, 808 F.Supp.2d 145 (D.D.C. 2011) (No. 1:11-cv-00106).

³⁰ *In the Matter of Project Concord, Inc. v. NBCUniversal Media, LLC*, MB Docket No. 10-56, Order on Review, DA 12-1958 (rel. Nov. 13, 2012).

³¹ Netflix US & Canada Blog, “The Case Against ISP Tolls,” Apr. 24, 2014, *available at*: http://blog.netflix.com/2014_04_01_archive.html (last visited: Aug. 18, 2014).

Comcast/NBCU merger, which did not appreciably alter Comcast's geographic footprint, the proposed merger of Comcast and TWC would create an entity five times the size of its closest cable competitor with unparalleled bottleneck and buying power to shut out any competition.

Moreover, the Comcast/NBCU conditions that were designed to ameliorate harms to rival MVPDs, such as the arbitration remedy for program access disputes, are not useful or helpful to smaller and new entrant video providers like ITTA member companies. For such providers, the time and financial resources involved in invoking the arbitration process to remedy the immediate harm from lack of access to programming make pursuing such relief infeasible.

More specifically, any relief to which smaller and new entrant MVPDs may be entitled as a result of arbitration would come too late to be meaningful or effective. With the inevitable delay in gaining access to programming through the dispute resolution process, the damage in terms of subscriber losses, decreased market share, and other harms would already be done. The Comcast/NBCU program access conditions effectively leave smaller and new entrant MVPDs with no practical remedy to ensure that they have reasonable access to vertically-integrated programming they must carry to compete, and therefore are insufficient to address the harms this transaction poses to competition.³²

V. THE STRUCTURAL CONDITIONS PROPOSED ARE NOT SUFFICIENT TO REMEDY THE HARMS CAUSED BY THE MERGER

The proposed divestiture of Comcast subscribers to Charter Communications through a series of transactions involving the sale and swap of certain assets and the spin-off of certain

³² In addition, the manner in which buying groups could potentially avail themselves of the Comcast/NBCU conditions is unclear. *See* Letter from Matthew M. Polka, the American Cable Association, and Shirley Bloomfield NTCA – The Rural Broadband Association, to the Honorable Patrick J. Leahy and the Honorable Charles E. Grassley, U.S. Senate Judiciary Committee (filed Apr. 9, 2014), at 2-3.

holdings into a new company partially owned by Charter does nothing to lessen the anticompetitive effects of the Comcast/TWC merger.³³

The parties claim that the transactions will be beneficial to competition because they will keep Comcast's share of video subscribers below 30 percent of the total video distribution market.³⁴ However, this aspect of the merger is not so much preserving marketplace competition as it is about carving up the marketplace to the benefit of Comcast and Charter. Rather than creating a situation in which Charter will now compete directly against Comcast or legacy TWC systems, the parties are clustering subscribers to create regional monopolies. For example, Comcast will enhance its stronghold in Los Angeles by acquiring Charter's LA holdings and Charter will dominate the Minneapolis market when Comcast's holdings there become part of SpinCo.³⁵

In reality, the proposed divestiture is "at best a bait-and-switch."³⁶ While the number of Comcast/TWC subscribers would be lower as a result of Comcast's agreements with Charter, "the concentration in key markets, including the crown jewels of New York and Los Angeles, would be higher as a result of Charter swapping some of its subscribers in these markets to the

³³ See, e.g., Chris Morran, "Comcast Deal With Charter Isn't About Improving Competition; It's About Carving Up Marketplace," Apr. 28, 2014, available at: <https://consumersunion.org/wp-content/uploads/2014/05/Comcast-TWC-attachments.pdf> (last visited Aug. 18, 2014).

³⁴ See Letter from Kathryn A. Zachem, Comcast Corporation, and Steven Teplitz, Time Warner Cable Inc., to Marlene H. Dortch, FCC Secretary, MB Docket No. 14-57 (filed June 5, 2014), at 1.

³⁵ See *id.* at Attachment 1.

³⁶ Allen Grunes, *Prepared Statement for House Judiciary Hearing on the Proposed Merger of Comcast and Time Warner Cable*, May 8, 2014, available at: <http://judiciary.house.gov/cache/files/665684a1-49d4-4aca-9bc1-79ae9ad387b9/grunes-testimony.pdf> (last visited: Aug. 19, 2014), at 20.

merged entity.”³⁷ The fact that Comcast has no intention of giving up subscribers in the largest and most valuable markets belies any notion that the proposed divestiture is pro-competitive or designed to serve the public interest. Moreover, the swaps do nothing to reduce the merged entity’s share of the broadband market, which would remain well over 30 percent. Therefore, Comcast’s proposed divestiture of subscribers to Charter cannot be viewed as a structural remedy that in any way addresses the competitive harms caused by the merger.

³⁷ *Id.* at 20-21.

VI. CONCLUSION

For the foregoing reasons, the Commission should deny the proposed Comcast/TWC/Charter transaction as detrimental to competition and the public interest.

Respectfully submitted,

**ITTA – THE VOICE OF MID-SIZE
COMMUNICATIONS COMPANIES**

By: /s/ Genevieve Morelli

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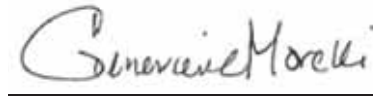
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August 25, 2014

Declaration

I, Genevieve Morelli, hereby declare under penalty of perjury that I have reviewed the foregoing Petition to Deny and that it is true and correct to the best of my knowledge.

Executed: August 25, 2014

A handwritten signature in cursive script that reads "Genevieve Morelli". The signature is written in dark ink and is positioned above a horizontal line.

Genevieve Morelli

Certificate of Service

I, Micah M. Caldwell, hereby certify that on this 25th day of August, 2014, I have caused a copy of the foregoing Petition to Deny to be served by electronic mail upon the following:

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